

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. 10 OF 2024

(FORMERLY KIAMBU CIVIL APPEAL NO. E031 OF 2021)

JAMES KAMAU MURAGURI.....
APPELLANT

VERSUS

GATATHA FARMERS COMPANY LIMITED.....RESPONDENT

*(An appeal against the judgment of honourable J.M. Nangea
Chief Magistrate in Thika CMCC No. 1246 of 2016 delivered on
the 9th February 2021)*

JUDGEMENT

1. The appellant lodged a claim for breach of contract by the Respondent at the trial court. It was the appellants claim that in November 2015 the Respondent, through its director *Lucas Kagumba*, retained him as an agent to source a buyer for the Respondent's land np. 1848/3 situated in Matungulu sub county, Machakos county comprising 1253 acres at an agreed commission of 3%. He successfully delivered on his mandate resulting in the Respondent receiving Kshs. 513,730,000. Nevertheless, the Respondent has neglected, refused or failed to pay him his commission despite demand.
2. The Respondent denied the claim stating that it was a stranger to the Appellant and thus urged the court to dismiss the suit with costs.
3. When the matter proceeded for trial, the appellant testified as PW1 where he adopted his witness statement and bundle of documents as exhibits. It was his testimony that he was introduced to Lucas Kagumba, whom he

alleged was a director of the Respondent, by one Kamau Gathogo Maxwel. It is the said Lucas who engaged him to sell land on behalf of the Respondent at a commission of 3%. Following the successful transaction, he received Kshs. 5,000,000.00 from the buyer. However, the Respondent did not pay the agreed commission despite demand. He clarified that he had no written authority from the Respondent requiring him to sell the suit property on its behalf nor was he an estate agent.

4. PW2 Maxwell Gathogo Kamande testified by stating that he is a friend and neighbour to *Lucas Kagwamba*. He confirmed that he introduced the appellant to the said Lucas Kagwamba. It was he that *Lucas* instructed to show the appellant the suit property. He agreed to be a witness for the appellant when he complained to him that the Respondent had failed to pay him his dues despite the transaction being successful.
5. PW3 Samuel Chege Njoroge testified that the suit property was bought by one Kariuki Ngari on behalf of Gakuyo Real Estate. The said *Ngari* had been brought by the appellant.
6. *Lucas Kagwamba* testified as DW1. He denied discussing any issue regarding sale of land with the appellant, instead, he maintained that the Respondent communicates through its Board of Directors which is responsible for authorizing and hiring brokers. He clarified that his encounter with the Appellant was limited to that of a patient and a herbalist.
7. At the end of the trial, the trial court found that the Appellant had failed to establish the existence of a principal agent relationship on a balance of probabilities. Consequently, the trial court dismissed the suit. The trial court observed that while it was clear that *Lucas*

Kaguamba had engaged the appellant as an agent to find a buyer for the suit property, there was no evidence that the said *Lucas* was acting on behalf of the Respondent and with full authority to bind the Respondent. Accordingly, *Lucas Kagumaba* was condemned to pay costs for the suit.

8. Aggrieved and dissatisfied with the decision of the trial court, the appellant filed the instant appeal via a Memorandum of appeal dated 4th March 2023 urging the following grounds:

- i. The learned trial magistrate erred in law in failing to appreciate that there was sufficient evidence before him to prove an agent principal relationship between the appellant and the respondent thus arrived at a wrong decision that the respondent was not liable to pay the appellant his commission.***
- ii. The learned trial magistrate erred in law and fact when he failed to consider the unchallenged evidence from the appellant that the purchaser sought by the appellant as the respondents agent eventually bought the land from the respondent thus arriving at a bad decision.***
- iii. The learned trial magistrate erred in law and fact in holding that DW1 a director of the plaintiff had no authority to transact or bind the respondent contrary to the law and evidence on record.***
- iv. The learned trial magistrate erred in law and in fact in applying the wrong principles in considering and determining the suit.***

9. Reasons wherefore the appellant prayed that the judgement of the trial court be set aside and be

substituted with a judgment in favour of the appellant for the sum of Kshs. 15, 411,900.00.

10. The court directed that the appeal be canvassed through written submissions.
11. It was the appellant's submissions that he had proved his case to the required standard and was thus entitled to the reliefs sought. He maintained that the contention that *Lucas Kaguamba* had no authority to bind the Respondent was inconsequential as ultimately, it is the Respondent that benefited from the sale of the suit property. The Respondent could therefore not hide behind legal personality only when it was convenient to do so.
12. The Respondent on the other hand submitted that the Appellant, by virtue of being unregistered, was not qualified to practice as an estate agent pursuant to **Section 18 of The Estate Agents Act CAP 533**. Therefore, entertaining any claim based on his role as an estate agent would be inviting this honourable court to sanction an illegality. Reliance was placed on the case of **Mapis Investment (K)ltd vs Knya Railways Corporation [2006]eKLR**.
13. Regarding the issue of costs, the Respondent submitted a cross appeal against the finding on costs being borne by Lucas Kagumaba. The court was urged to adopt the established position that costs follow the event. The trial court's finding on costs was *per incuriam* as there was no rationale for laying costs on *Lucas Kaguamba* on allegation that he had misled the Appellant. It was thus urged that the appeal be dismissed with costs to the Respondent.

14. I have carefully considered this memorandum of appeal, the record of proceedings before the lower court as well as the written submissions filed by the appellant. The issues that commend themselves for determination are:

- i. Whether there existed a legally enforceable contract between the appellant and the Respondent.*
- ii. Whether the Appellant is entitled to the reliefs sought*

15. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions **[see Peters -vs- Sunday Post Limited [1958] E.A 424].**

16. In **SELLE and Another v Associated Motor Boat Company Ltd & Others [1968] 1. E.A 123** it was stated as follows:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

17. The first question to be answered is whether there existed a legally enforceable contract between the Appellant and the Respondent. It is trite law that he who alleges must prove.

18. **Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya** provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

19. This was reiterated in **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, where the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

20. Therefore, the appellant, having contended that there existed a binding contract between the parties had the legal burden to satisfy the court that this is indeed the case.

21. The elements of a contract were summarized in the **Halsbury’s Laws of England 4th (ed.) Re-Issue Vo. 9(1) paragraph 603 at page 340** as follows:

“To constitute a valid contract (1) there must be two or more separate and definite parties to the contract; (2) those parties must be in agreement, that is, there must be consensus on specific matters (often referred to in the older authorities as ‘consensus ad idem’); (3) those parties must intend to create legal

relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (4) the promises of each party must be supported by consideration or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise."

22. The appellant contends that he entered into a contract for provision of estate agency services by one Lucas Kaguamba on behalf of the Respondent. The Respondent on the other hand contends that no such contract existed as the appellant was not a registered estate agent. Therefore, he had no capacity to enter into such a contract, if any, with the Respondent.

23. **Section 18 of the Estate Agents Act Cap.533** provides as follows:

"18(1) After the expiration of six months from the commencement of this Act or such further period as the Minister may, by notice in the Gazette, allow either generally or in respect of any particular person or class of persons:-

(a) No individual shall practise as an estate agent unless he is a registered estate agent.

(b) No partnership shall practise as an estate agent unless all of the partners whose activities include the doing of acts by way of such practise are registered as estate agents,

(c) No body corporate shall practise as an estate agent unless all of the directors thereof whose duties include the doing of acts by way of such practice are registered estate agents.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding 20,000 shillings or to imprisonment for a term not exceeding two years or to both."

24. This position was reiterated by the Court of Appeal in **Mapis Investment (K) Limited v Kenya Railways Corporation [2006] KECA 344 (KLR)** that:

"In the letter dated 20th November 2002 in which it was stated that the appellant and Mr. Shompa were not registered, was produced in evidence by Mr. Shompa, a director of the appellant without any denial of the non registration. This was in our view tantamount to an admission of the facts giving rise to the illegality. That being the case it was then a matter of law as to whether the non registration resulted in the illegality of the contract; it is clear that a contract to perform estate agency services can only be legal if entered into with a registered Estate Agent. (Emphasis applied)"

25. I note that the appellant has not rebutted the Respondent's position that he was not a registered estate agent thus, incapable of providing estate agency services. As a result, the alleged contract between the Appellant and *Lucas Kaguamba* was illegal.

26. Notwithstanding the issue of illegality of the contract, the appellant contends that the mere fact that *Lucas Kaguamba* was a director of the Respondent means that his decisions automatically bound the Respondent too. From the record, there is no board resolution or evidence that the said *Lucas Kaguamba* was ever instructed by the Respondent to transact on behalf of the 2nd Respondent.

27. At all material times, it was the appellant who bore the burden of proving that the said *Lucas Kaguamba* had been duly instructed by the Respondent and therefore had the capacity to bind the Respondent.

28. The appellant had the duty to show that a contract existed with the Respondent and to show that it had performed all the preconditions of the contract which it had undertaken to perform. The appellant has failed to prove this, therefore there is no valid contract between the parties that this court is capable of enforcing.

29. I therefore uphold the finding of the trial court that the appellant had failed to prove his claim against the Respondent to the required standard.

30. It is trite that costs follow the event. The trial court having found that the appellant had indeed not proven his case against the Respondent had no legal basis to award costs to the appellant to be borne by the said Lucas Kaguamba. The trial court therefore erred in making that finding.]

31. ***The upshot of the matter is that the instant appeal is disposed as follows:***

- i. Appeal dismissed. The finding of the lower court is upheld.***
- ii. I allow the cross appeal by setting aside the order for costs.***
- iii. Each party to bear its own costs.***

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH, 2026.

HON. T. W. Ouya

JUDGE

For Appellant.....No Appearance

For Respondent.....Ngaita

COURT ASSISTANT.....Brian

ORIGINAL